

**Fiore Reporting and Transcription Service, Inc.**  
**4 Research Drive, Suite 402**  
**Shelton, Connecticut 06484 (203)929-9992**

1 (Proceedings commenced at 4:43 p.m.)

2 THE COURT: Portelos v. City of New York, 12-CV-  
3 3141. For the plaintiff?

4 MR. GLASS: Bryan Glass with Mr. Portelos to my  
5 left.

6 THE COURT: All right. I've got to turn the various  
7 mics off from the last conference. So pull them close to  
8 yourselves and make sure the green light's on. All right.  
9 For the City defendants?

10 MS. GIAMBRONE: Assistant Corporation Counsel,  
11 Jessica Giambrone. Good afternoon, Your Honor.

12 THE COURT: Good afternoon. Okay. You can all stay  
13 seated. We're going to record it and we'll get a better  
14 recording.

15 All right. So before we start talking about the  
16 discovery, we're going to deal with the request to amend the  
17 complaint, or supplement the complaint.

18 I just want to ask one question. There's sort of  
19 two kinds of allegations in there. One is the thing about the  
20 false arrest, which is a separate claim, and then there's this  
21 additional information about the 3020(a) proceedings.

22 Does the 3020(a) information need to be any -- in  
23 any pleading to be brought up in this case? It seems like at  
24 least it's -- there's no new claim added for it. It's just  
25 additional facts. Anybody?

1 MS. GIAMBRONE: Well, Your Honor, I -- no, I don't  
2 see how that's an independent claim.

3 So I think to the extent that it comes up in this --  
4 in the original complaint it doesn't require any sort of  
5 additional amendments.

6 MR. GLASS: We're more concerned about consequences  
7 of the 3020(a) so since he's been -- as we found out during  
8 the last deposition of Ms. Brody, you know, there's a policy  
9 of what they do with teachers after a 3020(a), which has led  
10 to ATR assignment. He hasn't been able to return to his  
11 school.

12 So there are damages that flow from having been  
13 subject to a 3020(a) proceeding, apart from the penalty, but  
14 also the Board has policies that come into play when a teacher  
15 is found guilty of any charge, including reassignment. You  
16 know, you lose your -- you can't back into a school.

17 THE COURT: But your argument is it's a retaliation  
18 and it's the same process that was started that you claim in  
19 your -- your first claim for relief was First Amendment free  
20 speech violation, and then your second claim is a New York  
21 State Civil Service law, 75(b) claim, right?

22 MR. GLASS: Correct.

23 THE COURT: All right. So I'm going to deny the  
24 motion to supplement and I've got the (indiscernible) on the  
25 record now so just -- it's going to take me a couple of

1 minutes to go through it, so sit tight and then we'll get to  
2 the discovery discussion.

3 So the proposed amendments, which are set forth in  
4 the proposed second amended complaint, which is on the docket  
5 at 59-1, includes the request that Desmond White be added as a  
6 defendant and William Connors.

7 Mr. White is listed as -- official, and individual  
8 capacity as a DOE chief information security officer and  
9 proposed Defendant Connors is an NYPD Detective.

10 And they're listed as parties in the proposed  
11 amended complaint and the main amendment, in terms of the  
12 facts, is the addition of paragraphs 54 through 57, with an  
13 amendment to 58 on the two types of facts that are described  
14 as basically the continuation of the ongoing 3020(a) process,  
15 and the general investigations of Mr. Portelos, as well as an  
16 arrest that happened on or about March -- well, sorry. Arrest  
17 related incident that started on March 4th, 2014, and then Mr.  
18 Portelos was arrested on March 10th, 2014.

19 And he says that he was held for about 33 hours and  
20 there was a decline to prosecute.

21 There are a couple of other proposed amendments to  
22 the complaint. I'm calling them amendments. It's -- these are  
23 really supplemental pleadings, but just for the ease of  
24 reference the main addition is the third claim for relief,  
25 which is about the false arrest. And then there are some

1 additional damages. So those are really what the changes are.

2 So following up on the question that I asked, it  
3 seems to me that the 3020(a) related supplement amendments are  
4 really unnecessary. They fit in with what's already been the  
5 subject of this litigation and there's no new claim.

6 The false arrest claim is entirely distinct and  
7 there is the suggestion, theory, proffer that the complaint  
8 was made as a form of retaliation.

9 But in order to investigate any kind of false  
10 arrest, false imprisonment, Section 1983, you have to get the  
11 heart of the analysis that goes with false arrest, which is a  
12 probable cause analysis.

13 That's very, very distinct from the First  
14 Amendment/civil service kind of questions that are being asked  
15 in the action more generally and requires at this very late  
16 stage of the game adding two new defendants, one of whom is  
17 listed as a DOE employee, but another who works for the New  
18 York City Police Department, which is an entirely separate  
19 entity from the parties who have had involvement in this case.

20 To underscore how late this is in this proceeding,  
21 I'm going to recount some of what's in the record with regard  
22 to the extensive discovery and discovery disputes that have  
23 gone on in this case.

24 This case was filed in June of 2012. There was some  
25 back and forth in motion practice. And one of the earliest

1 orders saying -- hard to believe it actually said this, but  
2 that discovery was supposed to be over in June of 2013. That  
3 was part of the February, 2013 order that's on the docket.

4 There was an order from May of 2013 that extended  
5 back discovery until September of 2013. There was supposed to  
6 have been an extensive discussion or e-discovery at that  
7 stage.

8 Discovery clearly did not come to an end because we  
9 ended up in September of 2013 discussing the possibility of  
10 the filing of a supplemental complaint and counsel were  
11 instructed to have discussions.

12 Then we had an extensive letter motion practice  
13 about what the confidentiality agreement should be.

14 And they had more briefing on the supplemental  
15 complaint. And time was granted to extend those discussions,  
16 but it came to a resolution on 12/17, 2013 where counsel  
17 consented to the filing of the amendment.

18 So we already had the first amended complaint filed  
19 back in 12/17, 2013, which is already a year -- almost a year  
20 and a half after the action started.

21 And the complaint was filed at 41 on the docket a  
22 year ago today, and it was answered on the 5th of February by  
23 defendant's counsel.

24 We then had more discovery conferences, including  
25 extensive discussions about the OSI, SEI, OEO files, which are

1 much in contention by plaintiff, who think they're very  
2 relevant, and defendants, who they have next to nothing with,  
3 what really went on here, but we had that discussion.

4 And there have been other discovery conferences  
5 since then, including one on May 27th, 2014 in which we went  
6 over many of the email disputes.

7 And then we had a conference in the end of July on  
8 the 30th with more orders coming out of that. Then we had one  
9 in September of 2014 and then that is the conference at which  
10 we had 10/24 as a close of fact discovery and it didn't happen  
11 then. That's where the issue of the supplemental complaint  
12 came up and I expressed some skepticism as to whether this  
13 proposed amendment was, in fact, related to the allegations  
14 that had been made in the complaint. I still have that  
15 skepticism thing.

16 You move ahead, despite the fact that the case was  
17 supposed to be closing in fact discovery -- let me see what  
18 the date is. The request at 59, which was on the 15th of  
19 October of this year, to supplement the complaint. So that's  
20 the one that I am denying now.

21 We had more conferences after that, although most of  
22 them were finishing up discovery that had already started. So  
23 although plaintiff suggests while discovery was fairly open at  
24 that stage, in my view, especially after the significant  
25 amount of work that had been done in terms of identifying

1 discovery that was going to be produced back in the spring,  
2 honing it over the summer, by the fall this was really  
3 supposed to be ending.

4 Here we are a week out from the end of the year and  
5 we're close to wrapping it up, but anyway the purpose of  
6 having that long description on the record of the extensive  
7 discovery that's happened is to highlight the fact that there  
8 have been multiple scheduling orders set in this case,  
9 generously extended time period for the plaintiff to ask for  
10 discovery.

11 Defendants have had to put an awful lot of effort  
12 into producing that discovery and I think that this case is  
13 appropriately looked at in light of those scheduling orders.

14 While the language that the plaintiffs cite -- the  
15 plaintiff cites in the papers in terms of whether the amendment  
16 should be allowed is about Rule 15 of the Federal Rules of  
17 Procedure. This case is -- and this posture is really about  
18 Rule 16.

19 Just to quote some of the relevant authority, you  
20 could look at *Amusement Industry, Inc. vs. Stern*. It's a 2014  
21 Westlaw 4460393 case from September 11th of this year.

22 That case was looking at Rule 15, noted that the  
23 Second Circuit had set forth standards for assessing motions  
24 to amend, but it looked at prejudice and said that -- held  
25 that an amendment prejudices a non-moving party when, among



1 other things, the assertion of a new claim or defense would,  
2 one, require the opponent to expend additional resources to  
3 conduct discovery and prepare for a trial or two,  
4 significantly delay the resolution of the dispute.

5 That's quoting from *Monahan vs. NYC Department of*  
6 *Corrections*, 214 F.3d 275 at 284, Second Circuit 2000.

7 And then it also says "Case law further explains  
8 that one of the most important considerations in determining  
9 whether an amendment would be prejudicial is the degree to  
10 which it would delay the final disposition of the action."  
11 That's quoting *MHA Inline Management, Inc., vs. County of*  
12 *Nassau*, 843 F. Supp. 2d 287, 341 Eastern District of New York  
13 2012. I'm going to omit the other quotations.

14 The case also notes that while (indiscernible) the  
15 delay on its own is not enough as basis to deny leave to  
16 amend, the court has discretion to deny leave to amend where  
17 the motion is made. After an inordinate delay, there's no  
18 satisfactory explanation for the delay, or the amendment would  
19 prejudice the non-movement.

20 So in this case -- I'm sorry. The one that I'm  
21 reading from, which is the *Ameza (ph) Industry* case, the  
22 district court noted the moving party did not seek to file the  
23 instant motion until 60 days -- less than 60 days before fact  
24 discovery was set to close, which is very similar to what  
25 happened here in this case.

1           There's a couple of other important and helpful  
2 cases. One is an unreported Second Circuit case, *Werking*,  
3 which is W-E-R-K-I-N-G, vs. *Andrews*. It's 12-CV-3277. It's a  
4 May, 2013 case. It's in the Federal Appendix at 526 Federal  
5 Appendix 94.

6           And in this case the circuit affirmed the district  
7 court's denial of the request to amend the complaint.

8           In this case, which makes the point that I made  
9 earlier, that really the proper way to look at this is under  
10 Rule 16 and is a scheduling question, and not solely is a  
11 question of whether leave should be freely given.

12           The Circuit said although leave to amend a complaint  
13 generally, open quote, "should be freely given in the absence  
14 of any undue delay or prejudice," close quote, which is  
15 quoting a case called *Clay vs. Martin*, 509 F.2d. 109 at 113  
16 from the Second Circuit, 1975, a party must show, open quote,  
17 "good cause," close quote, to amend his or her complaint if  
18 the motion is filed after the deadline imposed by the district  
19 court in its scheduling order.

20           And the court noted in this case that there was no  
21 doubt that the plaintiff's motion was untimely. It was filed  
22 eight months after the deadline set by the district court and  
23 in order to be allowed to amend, you would have to show good  
24 cause for the failure to propose the amendment earlier and  
25 you'd have to show good cause, diligence and the amendment

1 would not significantly prejudice the non-moving party.

2 So here in this case I don't think I even went back  
3 as far in the docket to look at the last date for an  
4 amendment, but it had to be many, many, many months before the  
5 close of fact discovery dates.

6 And when this motion was filed discovery was set to  
7 close in a couple of weeks, and that was already a date that  
8 had been extended many times.

9 Additionally, and importantly, this claimed arrest  
10 that's the basis for the plaintiff's claim happened back in  
11 the spring and this motion was made in October. The whole  
12 thing was raised to the court in September.

13 So it's late and it was after the deadlines and the  
14 close of -- what should have been the close of discovery.

15 So a couple of other cases. There is *Baez*, B-A-E-Z,  
16 vs. *Delta Airlines, Inc.* It's 2013 Westlaw 5272935 and it is  
17 from the Southern District of New York, September 18th, 2013.

18 This case similarly talks about how one should  
19 consider a scheduling order and the moving party bears the  
20 burden of demonstrating a satisfactory explanation for the  
21 delay and showing that there would not be prejudice.

22 In particular, the court considered the new claims  
23 could cause difficulties for the defendant in the case and  
24 what's described as new claims in the *Baez* case are -- they  
25 are new because they're based upon different facts and would

1 require the application of different law.

2 As I mentioned earlier, the proper analysis for a  
3 1983 case based on a false arrest claim includes at its core  
4 an analysis of probable cause, which is very, very different  
5 from the allegations that are made here about alleged  
6 discriminatory -- retaliatory conduct that violates the first  
7 amendment.

8 So to defend against these claims at this stage  
9 would require a significant opening of discovery. A, addition  
10 of the parties is to individuals who the plaintiff proposes be  
11 added to the case and a whole lot more work, and I don't think  
12 that it would make anything really more clear.

13 Certainly, this decision is without prejudice to  
14 what plaintiff's counsel had noted was a possibility, which is  
15 bringing the action as a separate action.

16 My saying that is not to express the view that there  
17 is any merit to it, or there's not any merit to it, but just a  
18 procedural matter.

19 This is not saying that you can't have your day in  
20 court. I'm saying your day in court here needs to be separate  
21 from what's happening.

22 Just for the record, a helpful statement of the  
23 authority to make this decision is in *Rivers vs. New York City*  
24 *Housing Authority*, 2014 Westlaw 1311557, in the Eastern  
25 District of New York, March 31st, 2014, and it's another --

1 it's a case in which the magistrate judge made a similar  
2 decision about what to do with the supplemental pleading.

3 And that case also looked at whether it was feudal  
4 or not. But in this case I think the prejudice to the  
5 defendants who have worked hard to have a complete production  
6 of discovery that is focused on the files that belong to the  
7 DOE, to the investigative units that have nothing to do with  
8 the NYPD would make this very difficult to conclude discovery  
9 and I think confuse the issues.

10 So the motion's denied.

11 MR. GLASS: (Inaudible). You had mentioned that  
12 (inaudible) in denying them and leave to amend was because at  
13 least some of the other facts kind of flow, like the 3028  
14 consequences flow from the decision.

15 So to the extent that discovery has revealed that  
16 there are a number of emails have been uncovered where the  
17 Board of Education was in communication with the Police  
18 Department, or you know, was aware of the arrest before it  
19 occurred, are these facts that are still part of this lawsuit.

20 I understand you're saying a separate 1983 false  
21 arrest claim may be against the Police Department or the City  
22 of New York, but I just wondered for clarification purposes --  
23 you know, because the facts could be amended just to talk  
24 about some of the -- as we're alleging that there's a  
25 retaliation in having him arrested, the discovery has revealed

1 several emails.

2 And I think we've said in some of the letters you  
3 received where, in fact, the Board was involved in that arrest  
4 and made the report, and we would like to argue that that's  
5 part of the retaliation against -- you know, part of the whole  
6 case, which is -- there have been consequences against him  
7 from the DOE initiating 3020(a), initiating a false arrest  
8 against him, which may be independent of false arrest claims,  
9 but may be part of the damages in this action.

10 And I -- part of the reason this wasn't raised later  
11 was because the discovery revealed a lot of those emails as  
12 part of these productions we were receiving over the summary,  
13 which helped us put the pieces together to show that, in fact,  
14 there was communications that we were not aware of between the  
15 DOE people and the Police Department prior to September of --  
16 you know, he didn't know in March when he was arrested exactly  
17 how that came about. Discovery has revealed some of that  
18 information.

19 So I guess -- I don't want to -- obviously, you made  
20 your decision. I'm just trying to understand -- some of those  
21 arrests facts are part of the outflow of the retaliation and  
22 to the extent that it's not, let's say, a 1983 claim against  
23 the police department, it still seems to be a part of this  
24 case.

25 THE COURT: So one, it's on information that was

1 provided in connection with your motion. Now to the extent  
2 you thought it was relevant, you should have mentioned -- but

3 --

4 MS. GIAMBRONE: If I can respond briefly.

5 THE COURT: I'm not going to change the decision.  
6 If you want to for the record --

7 MS. GIAMBRONE: Yes, Your Honor. Just for the  
8 record, the actors who are named in this lawsuit are Linda  
9 Hill and Armenia Claudio, and they have absolutely nothing to  
10 do with the arrest that occurred in the spring of this year  
11 and there are no emails that go to their involvement because  
12 simply put, they were not involved.

13 Additionally, you know, First Amendment retaliation  
14 flows from actors, not from the agency.

15 And in any event, plaintiff certainly could have  
16 moved to supplement and then sought discovery related to that  
17 to ascertain where the arrest came from.

18 The arrest was directly related to a blog posting  
19 where he advised people how to hack into the Department of  
20 Education's website.

21 So it certainly wasn't a surprise to him to learn  
22 that the Department of Education may have been involved in the  
23 filing of a complaint that they had to expend funds to  
24 investigate this blog posting about how to hack into their  
25 payroll system.

1           So we just want to make those points for the sake of  
2           the record.

3           THE COURT:   So --

4           MR. GLASS:   I just --

5           THE COURT:   No.   I don't need any more discussion.  
6           We've already talked about this.

7           We had an overview discussion and then I gave you a  
8           chance -- that was back in I believe September, I gave you a  
9           chance to put in the papers.

10          I've seen the proposed complaints and read it and,  
11          you know, whether there's anything in discovery that you think  
12          might be relevant I don't know, but the bottom line is it's  
13          late and it would be prejudicial to the defendants to add this  
14          -- October was -- I mean, there were deadlines already, which  
15          I've extended to plaintiff's benefit, but I don't think should  
16          be to defendant's detriment in terms of expanding this case.

17          The analysis is separate and -- in terms of probable  
18          cause under the Fourth Amendment, versus this First Amendment  
19          discussion that has been going on in this case.

20          And what counsel said is complimentary to what I'm  
21          going to say, which is in the false arrest case, it's the --  
22          you're looking at the individual actors and the actors that  
23          you allege are the two who were in part the folks who took the  
24          active steps with regard to the arrest.

25          And the person at the DOE, which is the DOE Chief



1 Information Security Officer, is not someone who's previously  
2 been named as a defendant, and certainly the police officer is  
3 not somebody who's had anything to do with this case.

4 So you may have ideas about whether there's some  
5 attitude or something towards the plaintiff that informed the  
6 complaints that were made, but the way in which one would  
7 raise and proceed with a 1983 false arrest case is distinct  
8 from what has been going on in this case. And at the end of  
9 the day it's too late to bring an issue.

10 If you think you have a viable claim, then file it  
11 as a separate 1983 action, if that's what you think should  
12 happen. All right.

13 MR. GLASS: Just to clarify. I understand your  
14 ruling, Your honor. I'm just trying to understand, are we  
15 precluded from raising issues about the arrest in the summary  
16 judgment response, for example, because I think we have emails  
17 that suggest coordination among the DOE people that are  
18 involved in that arrest.

19 So I'm just trying to clarify --

20 THE COURT: I'm not --

21 MR. GLASS: Because I expect the next thing --

22 THE COURT: All right. Look. We're going to have  
23 this conference. We're not going to keep going back over  
24 every single thing that happens as we go along. I don't want  
25 to hear long, long narratives about what the case is when

1       they're not relevant. It's not helpful.

2               And that's how many of these conferences have been.  
3       We're on the eve of the end of the year. I brought you in here  
4       so that we could try to wrap this up.

5               I'm not making a decision about what you can put in  
6       your motion for summary judgment. If you think it's relevant  
7       and you have the evidence, put it in. But it's not a separate  
8       claim that you're bringing in this case. We're not have a  
9       false arrest claim against these two individuals, or if you  
10      some idea that it involves the other people -- it doesn't --  
11      the complaint doesn't explain how it would have anything to do  
12      with the plaintiffs who have -- I'm sorry -- the defendants  
13      who are already individually named in your case.

14              If you think that you have the information and it's  
15      relevant and you think it's somehow -- some kind of damages,  
16      then you can present it to the district judge, if she'll let  
17      you make your motion for summary judgment, or let's you --  
18      anyone makes this motion.

19              All right. Let's talk about discovery.

20              It seems like, from what I can gather from the  
21      letters, and I have a couple of different things.

22              We've got the December 22nd letter, which has -- I  
23      don't know, sort of goes on a bit, and it originally had an --  
24      the attachments are illegible.

25              We got another copy of the privilege log, which I

1 think seems to be at the heart of this dispute.

2 Then there's some reference to the letter that's in  
3 the record about discovery from September 19th, that's on the  
4 docket at 49. There's an unredacted copy that was not filed  
5 on ECF. We have a copy of it.

6 And there is -- well, it's really a more legible  
7 copy of the fax.

8 It seems like what the main issue is you disagree  
9 with each other about how certain communication between  
10 individuals who are lawyers and other people should be  
11 considered, if those lawyers have what plaintiff seems to view  
12 as either non-legal or co-legal roles, I guess it seems to be  
13 -- to summarize what the argument is.

14 So have you had any discussion about this log or  
15 about the issue?

16 MS. GIAMBRONE: No, Your Honor.

17 Counsel has never reached out to me to articulate,  
18 and frankly, I was quite surprised to receive the email,  
19 because when we had a conference with Your Honor on the 15th,  
20 he actually represented that he believed there was nothing  
21 substantial left. We had a deposition of Ms. Rodi. Nothing  
22 was mentioned.

23 You know, there are misrepresentations put in the  
24 letter to the court. The first misrepresentation was that the  
25 issue was that there are emails to DOE personnel and non-DOE

1 personnel, which in a subsequent letter that argument is not  
2 pursued, because it's just not the case.

3 Additionally, there are allegations that David  
4 Brodsky is an investigator, and I actually reached out to Mr.  
5 Brodsky, so that I was precise in explaining what his role is  
6 and he is the -- he oversees the Office of Labor Relations,  
7 serves as chief labor counsel to the general counsel and the  
8 chancellor.

9 He is the lead negotiator in collective bargaining  
10 on behalf of the DOE. With respect to the Office of Labor  
11 Relations, it is a legal office that among other things  
12 litigates on behalf of the DOE at contract arbitrations, at  
13 Curb hearings, et cetera. They also administer the pre-  
14 arbitration grievance process for all unionized DOE employees.

15 The Office of Labor Relations provides guidance and  
16 advice to supervisors across the DOE regarding matters  
17 pertaining to interpretation of collective bargaining  
18 agreements, employee performance and other related matters.

19 This is an individual who acts as an attorney day in  
20 and day out.

21 Additionally, I certainly understand the case law  
22 that states that simply by virtue of being an attorney ones  
23 communications are not privileged and counsel is aware of that  
24 because Ms. Rodi is an attorney and -- as was Mr. Becker --  
25 not Mr. Becker. I'm sorry. Andrew Gordon, and a number of

1       their emails and correspondences throughout that were  
2       exchanged were not redacted because they work in more of a  
3       personnel capacity, rather than a legal capacity.

4               So the matters that have been redacted are the  
5       portions in which attorneys at the DOE are working in a legal  
6       capacity, are offering legal advice, are being asked for legal  
7       advice and are offering opinion.

8               And I frankly was quite surprised to see that we  
9       were revisiting issues which I had believed had already been  
10      discussed and exhausted at this point.

11              THE COURT: All right. For the plaintiff.

12              MR. GLASS: First I'd like to explain why there  
13      hasn't been any discussion about this because as you recall,  
14      Your Honor, after we finished Rodi's deposition, the next day  
15      you asked for a status letter.

16              I put a status letter on the -- I didn't hear from  
17      Ms. Giambrone, so I wrote her own status letter, and I wrote  
18      basically that I was asking for additional time to consider  
19      any privilege log issues which we hadn't fully vetted and  
20      finished it.

21              And so what happened was as soon as I put in a  
22      letter asking for a couple of weeks, Ms. Giambrone called me  
23      up, scolded me and said you know I'm going on leave. This is  
24      atrocious. I'm going to write to the court and basically  
25      proceeded to yell at me for 20 minutes.

1           So basically -- then I got the court order that said  
2           to do this by Monday, since her letter went on a Thursday or  
3           Friday, and so we've had to rush to put this letter together.

4           And we didn't want to close discovery without -- you  
5           know, I consulted with my client and we discussed some of  
6           these privilege log issues on a very short basis. We were  
7           going to take some time with it.

8           Given that Ms. Giambrone wanted to rush the issue,  
9           that's why we're here today.

10           And these privilege log issues, I think as Ms.  
11           Giambrone is admitting, is basically her perception of who  
12           qualifies as a lawyer, where she decides she deems to be  
13           appropriate serving in a dual role. You know, everyone is an  
14           attorney here. Bronsky's an attorney. Rodi's an attorney.  
15           McClaren is an attorney.

16           Everyone at the Board of Ed. serves as dual  
17           functions and it seems like Ms. Giambrone is making her own  
18           call as to decide which -- I appreciate she's made some  
19           liberal calls and she's given us Mr. Gordon's emails after we  
20           had to come back to the court, because we had one -- but when  
21           we came back to Your Honor they decided to give us 789.

22           And then there was -- with Ms. Rodi they gave us  
23           nothing and then they decided to give us most of her emails.  
24           And these have been very helpful emails.

25           So I appreciate that, but Mr. Bronsky's serving as a

1 labor relations counsel. He's not serving as a lawyer. Yes,  
2 he was a colleague of mine in corporation counsel.

3 Now he's the labor relations counsel. He's not  
4 serving for Portelos in this case, as necessarily the attorney  
5 in charge here. He's a labor relations person. McClaren is an  
6 investigator.

7 And so I think the appropriate thing would be some  
8 kind of -- you know, we would like some kind of in-camera  
9 inspection on the privilege log on these particular emails and  
10 the court should make the call. Because you know we're  
11 basically -- as we've expressed several times in this case,  
12 we're sort of at the mercy of the DOE and how they want to  
13 classify their people.

14 Everyone in that office is part of the DOE. Most of  
15 them are attorneys and they're just deciding on their own  
16 basis what's important and what's not and sometimes we might  
17 get something in one production that's excluded in another  
18 production.

19 I think we presented Exhibit 1 because we were  
20 showing -- we got that as part of the SEI investigation but it  
21 was not part of Hill's disclosure.

22 So there's -- it's just -- you're relying on the  
23 good faith aspects of the corporation counsel and to the  
24 extent -- you know, I'm not saying they're arguing in bad  
25 faith, but there is some anger in this case. The corporation

1 counsel's not exactly involved with my client and so she can  
2 make calls -- she has discretion to make these calls on her  
3 own without really any legal basis.

4 And so all we're really asking for, Your Honor,  
5 you've asked us to identify the privilege log emails. I think  
6 it would make sense that the court take a look at them and  
7 make its own conclusion rather than to rely on the good faith  
8 aspects of the corporation counsel in this case.

9 And it's not a lot of discovery. The reason we're  
10 rushed here today is Ms. Giambrone wanted to finish this  
11 before she leaves and I understand that.

12 It's going to be difficult for someone else to take  
13 over, but that should not necessarily short circuit the  
14 plaintiff from getting what he's entitled to in this case.

15 MS. GIAMBRONE: Your Honor, I don't intend to go  
16 back and forth all evening, but at the deposition of Ms. Rodi,  
17 I told counsel I believe discovery is closed. We have to  
18 write a letter to the court tomorrow.

19 If you think differently, let me know and I will  
20 respond to whatever it is you take issue with.

21 Counsel talks about rushing discovery. Discovery  
22 closed at the end of October and every time we come before  
23 Your Honor it's I need a little more time. I need a little  
24 more time.

25 The privelege log is a formality. The two and from,



1 the date, the subject, has always been revealed to plaintiff's  
2 counsel and he certainly has had plenty of time to peruse  
3 these emails

4 And if be believed that there was something that was  
5 not privileged there was nothing in my privilege log that  
6 illuminated the issue.

7 Your Honor has ordered that in early December he was  
8 to identify specific emails that the believed were not  
9 appropriately redacted and covered by privilege.

10 So yes, I was surprised when on December 15th I  
11 conveyed to the court that I was starting maternity leave on  
12 January 1st and out of the blue he requested an extension  
13 until December 31st.

14 And I did not call him and yell at him. I called him  
15 and said that I believe that his letter was extremely  
16 suspicious in its timing and I believed unprofessional and  
17 discourteous in making this request at this late juncture.

18 Discovery was closed at the end of October. The  
19 things that were brought up in the letter days ago are things  
20 that I can point have been -- counsel has known about since  
21 August.

22 THE COURT: So let me understand.

23 So this -- so when you produce the document, you  
24 leave like the header --

25 MS. GIAMBRONE: Yes.

1 THE COURT: The date, the person --

2 MS. GIAMBRONE: The subject.

3 THE COURT: So just taking this list, for example.  
4 It says document 1 OSI SEI 5924. So you know what it is. You  
5 know it's an email. The date is there. The subject line was  
6 shown?

7 MS. GIAMBRONE: Yes.

8 THE COURT: And then you know that it's between  
9 Tracy Cooney and I don't know who the other attorneys are,  
10 including Courtney Jackson Chase.

11 MS. GIAMBRONE: Yes. I have always exchanged the  
12 parties to the email and the subject and the date.

13 THE COURT: And so you know when these different  
14 document were produced? Or what -- I don't know if there's a  
15 better way to ask that question.

16 When was the last production or --

17 MS. GIAMBRONE: The last production -- I'm sorry. I  
18 have a production log here somewhere.

19 The last production was on October 17th, the Kay  
20 Rodi emails.

21 THE COURT: And how about before that? Do you know?

22 MS. GIAMBRONE: Let's see. The emails from Andrew  
23 Gordon were exchanged -- the inadvertent production was  
24 September 30th. So certainly counsel had them to review at  
25 that point.

1           And then the subsequent production, which merely  
2           redacted privileged matters, were October 17th.

3           THE COURT: All right. Why am I only getting this  
4           complaint now? And you're suggesting that this privilege log  
5           is the issue, but if you have had the document since October,  
6           it's more than two months. And that's the latest, right?  
7           Some of this came earlier, right?

8           MS. GIAMBRONE: Oh, yes. The first e-discovery  
9           exchange was in August of 2013 and at that point there were  
10          3,000 emails exchanged.

11          MR. GLASS: I don't think we got the privilege log  
12          till December though.

13          THE COURT: Yes, but the point is you had the  
14          documents. I mean, this is a nice --

15          MR. GLASS: Well, they're supposed to provide a  
16          privilege -- that is -- the privilege log -- if you know, if  
17          you have all the information that is a proxy to the privilege  
18          log, which counsel is telling me now that you had.

19          So looking at this for OSC SCI, 5924. You knew it  
20          was an email. You knew it was dated May 22nd, 2014. You knew  
21          what the line was. Staten Island's principal's misconduct  
22          case left open indefinitely and you knew that it was at least  
23          between Tracy Cooney and Courtney Jackson Chase. I don't have  
24          it in front of me. But maybe you knew that the other people  
25          were attorneys.

1                   Number two, OSI SCI 5928, 5929 the same -- is that  
2                   date supposed to be --

3                   MS. GIAMBRONE: December -- yes, that would be  
4                   wrong.

5                   THE COURT: There's a typo there.

6                   MS. GIAMBRONE: But the date --

7                   THE COURT: The email is about Hill. It's from  
8                   McClaren to Cocoolis (ph). I mean, you had all the  
9                   information.

10                  MR. GLASS: I think we got it at the end of October,  
11                  initially. It has 800 pages and to take a month and then get  
12                  the privilege log --

13                  THE COURT: No, no, no. That's not what happened,  
14                  at least according to what counsel just said.

15                  I asked her what the last date of the production  
16                  was, which was mid-October --

17                  MR. GLASS: No. October 27th. We have the letter  
18                  right here. Enclosed is -- these are over -- how many pages  
19                  were there -- there were 700 pages disclosed on October 27th  
20                  in a letter that we received.

21                  MS. GIAMBRONE: But those were the Kay Rodi emails  
22                  which are not the subject of plaintiff's complaint.

23                  THE COURT: Right. Right. Do you have other dates  
24                  for the production? Maybe you can tell by the Bates numbers?

25                  MS. GIAMBRONE: Yes.

1 The A. Gorden emails --

2 THE COURT: So what's the Bates range?

3 MS. GIAMBRONE: Which is 3092 to 3846 --

4 THE COURT: Okay. So that's -- hold on. Let me  
5 write it down. Tell me that again.

6 MS. GIAMBRONE: 3090 to 3846.

7 THE COURT: All right. So those -- so that's  
8 starting with 8 and I think -- so your complaints that go from  
9 8 through --

10 MR. GLASS: Your Honor --

11 THE COURT: I'm sorry. That's all. Basically, from  
12 8 to 54, which are the NYCE -- right? Am I reading this  
13 correctly? Yes.

14 MS. GIAMBRONE: It seems to cover a bulk of them.

15 THE COURT: Okay. That's everything that's there.

16 So you're complaining about the Gordon -- the emails  
17 made in the Gordon production. When was that made?

18 MS. GIAMBRONE: The inadvertent production was  
19 September 30th and the subsequent production was hand  
20 delivered on October 17th.

21 MR. GLASS: Your Honor, it's our recollection that  
22 Your Honor suggested the privilege log as a way to get through  
23 these issues.

24 THE COURT: That's for me. I'm not trying to make -

25 -

1 MR. GLASS: But I'm just trying to say that we  
2 didn't get the privilege log that the court suggested until  
3 December. So for us to come back two or three weeks later and  
4 say this is our questions, all we're asking Your Honor to do  
5 is take a look at these documents in camera. I'm not asking  
6 for a huge production and new discovery here.

7 I'm saying these are timely objections and -- I  
8 mean, she raised the privilege log. We're raising some  
9 questions. I'm just --

10 THE COURT: Mr. Glass --

11 MR. GLASS: -- before we close discovery, all I  
12 wanted to do is take a look at these emails.

13 THE COURT: I heard you. I mean, I'm going to say  
14 this again.

15 Every conference you repeat yourself over and over  
16 again. I'm listening. I hear it. It is not helpful, or  
17 productive or efficient to do it that way.

18 I understand. You want me to look at it in camera.  
19 I can read it on the side. I read your letter and I heard your  
20 earlier.

21 My question is you -- according to what counsel just  
22 said you had the production that included the emails 3090 --  
23 I'm sorry. This is the Bates numbers for these documents.  
24 3090 through 3846, which my looking at this list looks like  
25 that includes the privilege log from item 8 through item 54.

1           So the vast bulk of this privilege log, about which  
2           you are complaining, came in the Andrew Gordon related  
3           production, which was made in the middle of October.

4           And in fact --

5           MS. GIAMBRONE: And the --

6           THE COURT: Hang on. Even though it was a problem,  
7           you had some documents sooner and we corrected that problem,  
8           but you actually -- you had them.

9           So the privilege log is a summary of what's going on  
10          here, but there is no explanation that you have made yet as to  
11          why you think that you were entitled to wait around for the  
12          privilege log when you had the information that basically they  
13          typed up and the only addition is privilege.

14          But given that this is -- and had been the point of  
15          the discussion, that there is this dispute about Mr. Gordon  
16          and a couple of other people as to whether they should be  
17          considered lawyers for the sake of the privilege being  
18          asserted, you already knew all this.

19          So how come I should be dealing with this on the  
20          very, very close of discovery, two months after you had the  
21          information? You say it's timely. I don't see how it is  
22          timely.

23          MR. GLASS: I mean, given that there are months of  
24          production to get -- for the City to come up -- for months and  
25          months to get 1,400 emails, for us to do it within a matter of

1 five or six weeks that you were suggesting, to say that we're  
2 so late that we waited for the last minute, just doesn't  
3 strike me as reasonable because honestly, the privilege log  
4 does kind of set forth what should have been provided.

5 We had previous discussions about the privilege log  
6 earlier and I even suggested let's try to avoid it, because  
7 it's going to cause her a mountain of work.

8 Then we finally decided to have the privilege log,  
9 which we received in December.

10 I mean, to say that we're dragging this on forever  
11 when we're limiting it to -- there's no prejudice to the City  
12 at this point to just turn over for the in camera inspection.

13 We're not dragging on discovery here forever and  
14 it's being perceived that we're dragging our feet on this when  
15 the City -- you know, to blame us for discovery delays just  
16 seems completely unfair in this matter given that this is not  
17 us causing discovery delays, the bulk of the discovery delays.

18 Most of the discovery delays were due to getting  
19 these documents in the first place.

20 And to say that we have to turn it over in a week or  
21 two, or we should have done it a week earlier, what is the  
22 prejudice to the City before we move for summary judgment,  
23 which they want to -- I think they're putting it off until  
24 some time in late January to do this final little piece. I  
25 don't see how anyone prejudiced by this.



1           So to say that we were dragging our feet, I take  
2           objection to that because I don't think we've dragged our feet  
3           at all.

4           To say that we have to from 1500 emails while we're  
5           trying to finish six depositions and get through all these  
6           depositions and we're not spending every hour on this the  
7           minute we get it, it doesn't seem unreasonable that we take a  
8           few weeks to do that.

9           And to just ask at the very end of the case to say  
10          let's just make sure that we have complete discovery, that the  
11          Board hasn't -- the City has not just willy nilly -- you know,  
12          we raised these issues before. We raised these issues in  
13          September and this is working out the process. This is a  
14          natural outgrowth of the process.

15          We've had these discussion back in -- they were  
16          squarely raised in my September letter and we came up  
17          solutions. And now this is just a final wrapping up -- we  
18          move forward to get this completed.

19          I mean, this is not the first time I raised this. I  
20          raised this in September and I believe it was the court that  
21          suggested let's do the privilege log. We were originally  
22          given a couple of weeks to look at the privilege log, to raise  
23          our concerns about particular emails and that's where we're at  
24          at this point.

25          It's not undilatory delay at this point and to say

1 the Board keeps perceiving this like this case has dragged on  
2 forever. I mean, these dates were established because the  
3 facts were growing during the course of the case. He didn't  
4 get arrested till March of 2014. That's why we don't -- we  
5 can't do anything overnight because these facts are developing  
6 as the case grew.

7 THE COURT: Mr. Glass, stop arguing the whole case.

8 MR. GLASS: Well, you wanted a response and --

9 THE COURT: I didn't --

10 MR. GLASS: -- these things are coming up because --  
11 it's because we dragging our feet. And to say that we're  
12 dragging our feet on this, new facts arise during the course  
13 of this litigation that require amended complaints, that  
14 require raising privilege log, getting documents when the  
15 Board decides to finally give it to us, and then to say we  
16 have to turn it over in two weeks or we should have thought  
17 about this when we got the privilege log in December. We  
18 should have thought to do it the next day. Its just  
19 unreasonable. So --

20 THE COURT: Again, you're not answering my question.  
21 The last production, which seems to be the bulk of your  
22 concern with regard to the dual identity seemingly of some of  
23 the employees who are attorneys with the DOE, was produced to  
24 you in the middle of October.

25 They're redacted. So it's not as if you had to go

1 through the papers and imagine where it was that they were  
2 asserting privilege. There are redactions in these pages.  
3 That's how they presented to you.

4 So it was not a big task to go through hundreds of  
5 pages. It was looking at approximately -- I don't know --  
6 maybe -- I don't know how many are in this, but it looks like  
7 something like -- fewer than a hundred pages.

8 MR. GLASS: It was over 800 pages.

9 THE COURT: Not of issues, not of pages that have  
10 anything to do with this privilege dispute. And you could  
11 tell that those were the pages that would be the subject of  
12 some dispute, or at least you were concerned because those  
13 were the pages with the redactions on them.

14 All right. I think it's late. Look. What's your  
15 basis for saying something like there's an issue when somebody  
16 -- let's look at number one. So we're going back to the OSI  
17 SCI files.

18 The communication between the chief deputy counsel  
19 and the general counsel. And there is nobody else listed  
20 who's not an attorney. I don't have the names of the other  
21 people, but they're identified as all being attorneys.

22 MR. GLASS: Your Honor, I just want to make sure,  
23 the copy that you're looking at, the privilege log, you have  
24 plaintiff notes --

25 THE COURT: Yes. You say they were then forwarded

1 to somebody, Candice McClaren, who's the OSI director.

2 (Pause.)

3 MS. GIAMBRONE: Your Honor, I'd be curious to ask if  
4 Mr. Glass has actually looked at these emails or if he's just  
5 accepting his client's legal interpretations.

6 THE COURT: I'm not going to ask about what's going  
7 on in their relationship, in the same way I'm trying to avoid  
8 asking what's going on in your client. So what's the basis  
9 for saying that communication among lawyers is not privileged?

10 MR. GLASS: Well, to the extent it's forwarded  
11 beyond the lawyers, the privilege is broken. I mean, it's  
12 going to OSI --

13 THE COURT: It's going to their client.

14 MR. GLASS: Non-lawyers.

15 THE COURT: It's going to their client. Isn't that  
16 who that is? I mean, these are communications between the --

17 MR. GLASS: Well, who is the client here? I mean,  
18 there's this question -- and then -- that's the tricky part of  
19 this case is, you know, is the client Linda Hill? Is the  
20 client --

21 THE COURT: All right. This is what we're going to  
22 do. Do you have all these documents together?

23 MS. GIAMBRONE: Not here, Your Honor.

24 THE COURT: I'm going to do the in camera  
25 inspection. If there is no basis for this, you're going to be

1 sanctioned for making a request that has no basis, because I  
2 don't see it here, but there is no quick way to resolve this.

3 If it turns out that you're right, that there is  
4 some problem with the dual agency, then that's fine. But four  
5 things that seem on their face to be protected, such as  
6 communications between the attorneys for an agency, the  
7 general counsel's office offering a legal opinion, I don't see  
8 any legal basis. It's just going to take too long to do this  
9 and I can look at it more quickly.

10 So what do you -- this is what? 800 pages. Can you  
11 flag them? What's the easiest way for you to give them to me?

12 MS. GIAMBRONE: I believe I have them all separate.

13 THE COURT: All right. So when can you send them  
14 over.

15 MS. GIAMBRONE: I was taking off the rest of the  
16 week, but I'll try to get to my office by Friday to put them  
17 together.

18 THE COURT: Is there somebody else who could just  
19 mail them over or --

20 MS. GIAMBRONE: Yes, I'll find a way to get them to  
21 you, Your Honor.

22 THE COURT: All right.

23 MS. GIAMBRONE: Should we email them, hand deliver -  
24 -

25 THE COURT: You can do either one. If you want to

1 email it, it's Scanlon\_chambers@nyed.uscourts.gov. I think  
2 if the file is very, very big, it might bounce back. And you  
3 should just call --

4 MS. GIAMBRONE: I'll probably hand deliver them.

5 THE COURT: Call my deputy and tell her that you're  
6 emailing it so that she knows to look there.

7 All right. So if you want to withdraw your request  
8 you can, but if I look at it and there's no basis for this and  
9 you have more than sufficient information to make that  
10 decision, then I'm going to consider sanctioning this, because  
11 we've gone around, and around and around on discovery in this  
12 case with a lot of wasted time.

13 All right. What else? Anything else in terms of  
14 discovery?

15 MS. GIAMBRONE: No, Your Honor. I think it's  
16 concluded at this point.

17 THE COURT: How about for plaintiffs -- plaintiff?

18 MR. GLASS: I guess I just want a clarification. To  
19 the extent the documents have been provided about the false  
20 arrest, are we able to use them in our other action?

21 THE COURT: I don't know what your confidentiality  
22 order says.

23 MR. GLASS: We'll raise it in a letter brief.

24 THE COURT: Well, what's the -- I mean --

25 MR. GLASS: I do (indiscernible) on the sanctions.

1 I mean, a lot of these on their face are talking about --  
2 we've raised the government attorney/agency privilege before  
3 and a lot of these involve Candice McClaren and other people.

4 So I think it's unfair to put this burden on you to  
5 make it -- I have to decide based on what I'm presented with  
6 to see if whether there's a good faith basis to just ask the  
7 court to look at these emails.

8 We've narrowed it and to say -- we've to put a  
9 sanction over -- the latest sanction over my head for trying  
10 to just say we'd like someone to look at this is -- some of  
11 these questions -- you know, some of these people are serving  
12 multiple roles, doesn't seem --

13 THE COURT: I've asked you over, and over and over  
14 what's the basis for saying that you don't think that these  
15 particular documents are protected by privilege. And I  
16 started with going back to the paper -- I started with number  
17 one, which is identified and you haven't told me anything  
18 different.

19 MR. GLASS: Well, let's look at number two. Candice  
20 McClaren. Is she serving as a government attorney or regular  
21 -- in what capacity is she serving here? Candice McClaren is  
22 the head of OSI. You're referencing her as an attorney.  
23 Andrew Gordon. There's an email here about Andrew Gordon now  
24 acting as an attorney in one case. You know, now she's  
25 claiming privilege because Andrew Gordon is acting as an

1 attorney in this situation. I think I saw an email from Andrew  
2 Gordon.

3 So I think it's just unfair to put a burden over me  
4 to say well, I'm going to sanction you if I conclude that none  
5 of these -- these are very complicated questions.

6 You know, David Brosky serves multiple roles for the  
7 DOE. He's a labor relations counsel. He's cited in a number  
8 of these descriptions of the documents.

9 So you know, are some of these -- you're going to  
10 probably say that they're -- it may be very true that some of  
11 these are protected by privilege and some of them are not.  
12 And we're just raising a question if they are.

13 THE COURT: Yes, but you refuse to take out the ones  
14 that seem -- based on the information provided, and you're not  
15 offering any reason to say why this is wrong.

16 For example, number five. Communication between  
17 Attorneys Candice McClaren and Courtney Jackson Chase  
18 discussing varying legal opinions and questions.

19 And the subject line is need guidance on PE's and  
20 per session. And that was part of the OSI SCI chain.

21 If you have some reason for saying that the two of  
22 them are not engaged in an attorney/client -- an attorney  
23 communication for the benefit of their client, then let me  
24 know.

25 You have -- let's see. It's not -- let me just be



1 clear. It's not a sanction. This is the rules are. If you  
2 make a meaningless request for discovery or application for  
3 which there's not a good faith basis, then that's the  
4 situation. I'm not adding anything to the rules.

5 You have -- let's see. Number ten. DOE employee  
6 seeking legal advice from general counsel, forward 202 days no  
7 charges.

8 No. 11, email to general counsel's office requesting  
9 legal review of draft. No. 12. Communication between DOE  
10 general counsel and DOE employee Andrew Gordon about a legal  
11 issue.

12 So even if Andrew Gordon is not acting as an  
13 attorney, he's discussing with the general counsel legal  
14 issue.

15 You have -- let's see. No. 18, communication from  
16 superintendent to DOE attorney seeking legal counsel. No. 22,  
17 communication to chief deputy counsel forwarding email for  
18 legal review.

19 Next one, 23, communication to David Brodsky, agency  
20 attorney, regarding issues of labor relations seeking legal  
21 advice. I mean, what -- counsel for the defendant may have  
22 made a mistake. That's possible. Maybe there's -- I agree.

23 If you want to look at the discussion of the fact  
24 that I've recently considered, you can look at a case called  
25 *Koumoulis*, which goes through this notion that sometimes

1 people act in a dual capacity and you don't have a privilege.  
2 It's a case about human resources.

3 So I'm aware of the tension in multiple roles, but  
4 you don't have any information here that suggests that at  
5 least the emails -- many of these email communications are not  
6 properly categorized as attorney/client privilege information.

7 So if you want to look at -- it's a parallel. Just  
8 so the record is here, it's *Koumoulis vs. Independent*  
9 *Financial Marketing Group, Inc.* --

10 MR. GLASS: Can you give me the --

11 THE COURT: 290 -- *Koumoulis* -- K-O-U-M-O-U-L-I-S.  
12 It's 296, FRD, 28. It's a November 1st, 2013 case. So you can  
13 look at what I read and what Judge Chen wrote in adopting it.

14 MR. GLASS: 295 FRD 28?

15 THE COURT: Yes.

16 MR. GLASS: Would it be acceptable perhaps to look  
17 at the case and then get back to you by the end of the week as  
18 to whether we want to pursue or --

19 THE COURT: Yes. I think I'm only going to get the  
20 -- sure. But -- well, then what do you want to do?

21 MS. GIAMBRONE: Well, presumably, I -- I'm assuming  
22 that plaintiff has actually looked at the emails for which  
23 he's asking for a follow up inspection.

24 So I would ask that he look at the case tonight and  
25 follow up with the court tomorrow as to whether or not he

1 continues to pursue further action on these points.

2 THE COURT: I mean, the case is going to weigh out  
3 in a human resources context that sometimes the documents are  
4 not privileged.

5 So what that case does is draw a line between the  
6 legal advice and conducting the investigation.

7 But the descriptions that are included in the  
8 privilege log and more importantly, the subject lines with the  
9 individual players make it clear that -- what these kinds of  
10 communications are.

11 So it's going to say that yes, there is some merit  
12 to this kind of argument. It's not going to tell you one way  
13 or another whether there's to any particular item on the list  
14 that's here bears any merit to it.

15 And based on the information I have, there is no  
16 merit.

17 MR. GLASS: The reason I'm asking for a little more  
18 time is because the privilege log issue was expedited and due  
19 very quickly because of the way the timing works.

20 So I'm just -- I need, as I explained to your clerk  
21 last night, I said I haven't had time to fully research the  
22 issues.

23 So what I'd like to do is take a little time to --  
24 you know, maybe I can reduce the log, perhaps shorten it quite  
25 and -- all she'd have to do is have the emails available. She

1 doesn't have -- I know she's going on leave. She'd just have  
2 to have them accessible to the next person and that would be  
3 it.

4 I mean, I'm not asking her to -- I'm just saying she  
5 could pull the email. She represented she has them  
6 undredacted, so she could just tell the person these are the  
7 emails that we need.

8 I don't think this is like a huge task here.

9 MS. GIAMBRONE: Well, frankly, this is not all  
10 related to the fact that I'm going out on leave.

11 As far back as May 27, 2014 there was an issue where  
12 plaintiff brought up privileges and emails and said that if  
13 there's an advice of counsel defense, so on and so forth, and  
14 at page 62 Your Honor discussed if there's no advice of  
15 counsel defense, then there are, in fact, valid privileges  
16 that can be asserted.

17 This is not a new issue. This is an issue that has  
18 been brought up repeatedly.

19 The privilege log was exchanged at the end of  
20 November. Certainly, counsel was the one who asked for the  
21 privilege log and that was done on October 30th.

22 And as I've put on the record, ultimately these  
23 emails -- there's no new information contained in the  
24 privilege log.

25 So frankly, it's not that I'm going out on leave.

1 It's the fact that plaintiff is now trying to use my leave for  
2 a further extension and to delay these proceedings when I am  
3 trying to set up this case so that it can finally be decided  
4 on the merits with my successor.

5 And I would hope that he has looked at these  
6 materials in order to make the application to the court so it  
7 shouldn't be an onerous task to mull over his request  
8 overnight and to advise the court and counsel whether or not  
9 he does indeed intend to proceed on this.

10 THE COURT: Okay. Let me ask. You have all these  
11 documents separate. Is that right?

12 MS. GIAMBRONE: They should be yes,

13 THE COURT: All right. Just send it to us. If the  
14 list gets reduced, we just won't look at the ones that are not  
15 on the list. So it's not going to impede what you're doing.

16 The point you made earlier is that you're saying you  
17 identified this issue in September and we've been talking  
18 about it in October. So you either know what you're talking  
19 about or you don't.

20 And for the record, again, you had all the  
21 information that is really relevant, the latest being October  
22 -- the middle of October.

23 So we've already talked about his ad nauseam. So  
24 let me know by Friday, close of business, or 5 o'clock on  
25 Friday, what it is your position is. I don't need a long

1 description. I just want to know which documents you are  
2 asking for me to review in camera.

3 MR. GLASS: Thank you, Your Honor.

4 THE COURT: All right. So let's see.

5 All right. So you have -- that's it, except for  
6 this issue, we're done.

7 Just to go back to this police record issue. I don't  
8 know -- I have not read -- reread the confidentiality  
9 agreement that you have in this case, so I don't know whether  
10 it's -- what information in this case could be used in another  
11 case. Obviously, if it's the plaintiff's own information, you  
12 could use it.

13 MS. GIAMBRONE: These are emails -- I assume they're  
14 contained in the emails which defendants have repeatedly asked  
15 for, a confidentiality order, but have been denied.

16 So to the extent -- I don't know what other police  
17 documents he's referencing.

18 THE COURT: I don't either, but I'm not going to  
19 make any ruling without knowing what the document is and which  
20 document -- which -- what confidentiality you're referring to,  
21 so --

22 MS. GIAMBRONE: Can we just have an affirmative  
23 statement from plaintiff that this the last issue and that  
24 discovery can be deemed closed?

25 THE COURT: Do you agree with that statement?

1 MR. GLASS: Just one other question I have about the  
2 -- I know you made an order about denying the leave to amend.  
3 Is that something that would have to -- if we took issue with  
4 it.

5 I'm not saying we are, but if we did, is that  
6 something that could addressed before the summary judgment or  
7 is that something that has to wait for the end of the case,  
8 because it's an interim --

9 THE COURT: Or you can go to the district judge on  
10 it, if you want.

11 MR. GLASS: I mean, it's just something that - I  
12 don't know. I'd have to kind of -- federal jurisdiction,  
13 whether it has to wait to the end of the case, if that was the  
14 situation. But --

15 THE COURT: You can appeal my decision to the  
16 district judge.

17 MR. GLASS: I see.

18 THE COURT: So you should look at the fairness  
19 appellate rules for appealing a decision of a magistrate  
20 judge.

21 MR. GLASS: And we just got that leave to amend  
22 issue.

23 THE COURT: That's fine with me if you want to bring  
24 it up before the district judge, but you just need to do it in  
25 a timely way.

1 MR. GLASS: Yes.

2 THE COURT: All right. So you have a date for the --

3 MS. GIAMBRONE: So is that set for the  
4 representation?

5 THE COURT: I don't know yet.

6 All right. Besides the privilege issue that we are  
7 in the process of resolving, is there any other discovery  
8 issue?

9 MR. GLASS: Part of our letter had raised the issue  
10 -- just the one issue about the conflict of interest board and  
11 the --

12 THE COURT: Which letter are you looking at?

13 MR. GLASS: The letter that we just filed.

14 And there was a representation made that it can't be  
15 turned over at the conclusion because it's -- that a conflict  
16 of interest board decision would be privileged in some way.

17 THE COURT: I thought we dealt with that many months  
18 ago. Is that something different or --

19 MR. GLASS: Well, it's addressed there as an  
20 authority for that, but if you --

21 MS. GIAMBRONE: I responded to that issue, Your  
22 Honor, in an August 20th, 2014 supplemental response to  
23 plaintiff, whereby he identified these redactions and I  
24 explained that they were pursuant to the conflict of interest  
25 law.



1 THE COURT: I thought that -- go ahead.

2 MS. GIAMBRONE: It's been brought up at previous  
3 conferences and seemingly plaintiff did not pursue it.

4 So I, again, was surprised that it came up in  
5 yesterday's letter.

6 THE COURT: All right. I'm not ordering them to  
7 produce that discovery at this stage. Plus we already talked  
8 about the merits and it didn't seem like it was necessary  
9 discovery.

10 All right. What else?

11 MR. GLASS: That is part of the privilege log, so  
12 we'll address it in our --

13 THE COURT: We're not revisiting it.

14 MR. GLASS: No, we're not revisiting it, but to the  
15 extent it's raised in the privilege log --

16 THE COURT: I'm not revisiting that decision. Go  
17 ahead. What else?

18 MR. GLASS: I have nothing further at this point.

19 THE COURT: Not at this point. Is there any more  
20 discovery besides this privilege issue that we've been talking  
21 about today?

22 MR. GLASS: I don't believe we have any outstanding  
23 requests at this point.

24 THE COURT: So do you agree that discovery is  
25 closed, except for the privilege issue that's going to be

1 resolved by the submission of the documents for in camera  
2 review and your confirmation of which, maybe all, maybe some  
3 of the items identified on the privilege log?

4 MR. GLASS: Can I just take one minute with my  
5 client just to make sure?

6 THE COURT: Yes.

7 MR. GLASS: Thank you.

8 (Off the record from 5:48 p.m. until 5:51 p.m.)

9 THE COURT: Okay. So what's the story. Any other  
10 discovery besides the privilege issue that we've been talking  
11 about?

12 MR. GLASS: Well, this is it for this case. We may  
13 have another case, but we'll save it for that case.

14 THE COURT: All right. I'm going to resolve the  
15 issue of the privilege and certify it to the district judge  
16 that discovery's done and let me just go back to the early  
17 order.

18 You're going to put in pre-motion conference  
19 letters? Yes?

20 MS. GIAMBRONE: Yes, I believe at the moment we are  
21 to file that by the 29th.

22 MR. GLASS: 29th of January?

23 MS. GIAMBRONE: December.

24 THE COURT: Is it -- plaintiff, are you making a  
25 motion or you're just going to respond?

1 MR. GLASS: Respond.

2 THE COURT: All right. So I'm just going back to  
3 what you're going to send over. Do you want to email it? You  
4 could do that or you could send over the paper copies. Just  
5 let us know where to look.

6 All right. I think that's it. You are soon to be  
7 Judge Mauskopf's good hands and I think we're done. All  
8 right.

9 MS. GIAMBRONE: Thank you for your help.

10 (Proceedings concluded at 5:53 p.m.)

11 I, CHRISTINE FIORE, court-approved transcriber and  
12 certified electronic reporter and transcriber, certify that  
13 the foregoing is a correct transcript from the official  
14 electronic sound recording of the proceedings in the above-  
15 entitled matter.

16

17



18

January 30, 2015

19

Christine Fiore, CERT

20

21

22

23

24

25